

Afghanistan^[1]

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Summary and Analysis

Afghanistan is a state in transition and therefore has no comprehensive legal regime. In 2004 a new Constitution was enacted but there is still no new civil legislation. The Constitution states that the family is a “fundamental unit of society” and provides for the state to protect the family and especially the child. The Constitution also provides basic human rights for the citizens of Afghanistan and states that Afghanistan will abide with signed international conventions.^[2]

Before the transition process started in 2001, the law in Afghanistan had developed into an amalgamation of secular legislation, Shari’a, and local custom. It is difficult to know exactly what the law of Afghanistan currently is, but to some extent, the legislation that was enacted until 1980 is still relevant. Therefore, until the new state begins to formulate its own legislation, the Civil Code of 1977 can serve as an indicator of the laws in Afghanistan.

In regards to family law, it seems that the Civil Code was influenced by Islamic law. This Civil Code, enacted more than 20 years before the CRC, does not treat children as rights-holders. Although Afghanistan has signed the CRC, it has not submitted an initial report, which suggests a possibility that the convention does not apply in practice in the state. Taking these factors into account, a reasonable conclusion would be that children are not guaranteed their rights according to article 12 of the Convention.

According to the U.S. Department of State Country Report on Human Rights Practices for the year ²⁰⁰⁴, “Child abuse was endemic throughout the country. Abuses ranged from general neglect, physical abuses, abandonment, and confinement to work in order to pay off families’ debts. There were no child labor laws or other legislation to protect child abuse victims.”^[3]

Background on the political transition of Afghanistan^[4]

In December 2001 the Afghan Interim Authority was formed, followed by the Transitional Authority, under whose auspices the Transitional Islamic State of Afghanistan was formed as of June 2002. According to The Bonn Agreement of December 5, 2001, the TISA had an 18-month mandate to hold a Loya Jirga (general assembly) to adopt a constitution and a 24-month mandate to hold nationwide general elections.

The Agreement states that a Constitutional Commission ("Commission") shall be established by the Transitional Authority with the assistance of the United Nations. It is also agreed that "free and fair elections" to choose a "fully representative government" must be held no later than two years from the date of the convening of the Emergency Loya Jirga (which was convened on June 9, 2002).

According to the Constitution, the Afghan government consists of a powerful and popularly elected President, two Vice Presidents, and a National Assembly consisting of two Houses: the House of People (Wolesi Jirga), and the House of Elders (Meshrano Jirga). There is also an independent Judiciary branch consisting of the Supreme Court (Stera Mahkama), High Courts and Appeal Courts. The President appoints the members of the Supreme Court with the approval of the Wolesi Jirga. Assembly elections are planned for late 2005.

[Afghanistan Independent Human Rights Commission \(AIHRC\) - Child Protection Unit](#)^[5]

The Afghan Independent Human Rights Commission was established in June 2002 based on the provision of the Bonn agreement. The mandate for the AIHRC is to support and facilitate the development of a sustainable independent national capacity for the promotion and protection of human rights in Afghanistan. By now the AIHRC has a strong legal identity through the Afghan new constitution.^[6]

One of the major tasks of the commission is to provide relevant protection for child rights in Afghanistan and to assist Government and non government organizations and associations to develop a joint policy for the protection of the rights of the children.

The child protection section of the commission, like the other programs of the AIHRC, is not an implementing body, but more of a coordinating and supporting body for all other stakeholders on the subject. It basically focuses on awareness raising and monitoring of the rights of children.

All the activities of the AIHRC in the child protection area are undertaken by close coordination and consultation with the coordination body of the child rights protection: the Ministry of education, Ministry of Justice, Ministry of the Interior, Juvenile Court, Save the Children US, UK, Sweden, Japan, AWN (The Afghan Women's Network), UNICEF.

Sources of Law (In Order of Authority)

قانون اساسی
افغانستان

د افغانستان
اساسي قانون

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ماده پنجاه و چهارم
خانواده رکن اساسی جامعه را تشکیل می دهد
و مورد حمایت دولت قرار دارد.
دولت به منظور تأمین سلامت جسمی و روحی
خانواده، بالاخص طفل و مادر، تربیت اطفال
و برای از بین بردن رسوم مغایر با احکام
دین مقدس اسلام تدابیر لازم اتخاذ می
کند.

د افغانستان اسلام د دين د پلوي د اصولو د بنسټ په ټولني اساسي رکن دی او د دولت تر پاملرنې لاندې ده .

ماده پنخوسمه
کورنی د ټولني اساسي رکن دی او د دولت تر
پاملرنې لاندې ده .
دولت د کورنی او په خانګړې توګه د مور او
ماشوم د جسمی او روحی روغتیا د تأمین، د
ماشومانو د روزنې او د اسلام د سپېڅلي دين له
احکامو سره د مغایرو رسومو د له منځه وړو لپاره
لازم تدبېرونه نیسي .

اته پنخوسمه ماده

دولت په افغانستان کې د بشر د حقوقو د رعایت د څارنې، ښه والي او ملاتړ لپاره، د افغانستان د بشر د حقوقو خپلواک کمېسیون جوړوي.

هر څوک کولای شي د خپلو بشري حقوقو د نقض په صورت کې دې کمېسیون ته شکایت وکړي. کمېسیون کولای شي د افرادو د بشري حقوقو د نقض موارد مربوطو قانوني څانگو ته راجع کړي او د هغوي له حقوقو څخه په دفاع کې مرسته وکړي. د دې کمېسیون جوړښت او د کار ډول یې د قانون له لپارې تنظیمېږي.

ماده پنجاه و هشتم

دولت به منظور نظارت بر رعایت حقوق بشر در افغانستان و بهبود و حمایت از آن، کمیسیون مستقل حقوق بشر افغانستان را تأسیس می نماید.

هر شخص می تواند در صورت نقض حقوق بشری خود، به این کمیسیون شکایت نماید. کمیسیون می تواند موارد نقض حقوق بشری افراد را به مراجع قانونی راجع سازد و در دفاع از حقوق آنها مساعدت نماید. تشکیل و طرز فعالیت این کمیسیون توسط قانون تنظیم می گردد.

Civil Code [8]

International Law

کنوانسیون (پیمان) حقوق طفل

[9]

ماده 12- آزادي عقیده طفل:

طفل حق دارد در مواردی که به زندگی اش مربوط میشود، عقیده خود را آزادانه بیان کند.

Translation [10]

Constitution

Constitution of Afghanistan[\[11\]](#)

Article 54

Family is the fundamental unit of society and is protected by the state. The state shall adopt necessary measures to ensure physical and psychological well being of family, especially of child and mother, upbringing of children and the elimination of traditions contrary to the provisions of sacred religion of Islam.

Article 58

The state for the purpose of monitoring the human rights in Afghanistan, and their protection, shall establish the Independent Human Rights Commission of Afghanistan. Every person in case of violation of his fundamental rights can submit a complaint to this Commission.

The Commission can refer persons whose fundamental rights have been violated, to legal authorities and assist defending their rights.

The structure and functions of this Commission shall be regulated by law. [\[12\]](#)

Civil Code

The Civil Code 1977 [\[13\]](#)

Article 39

The age of majority is 18 solar years. Person attaining majority age shall be recognized as having full legal personality in business transactions.

Article 40

Person who does not understand the nature of transactions due to minority of age, mental retardation or insanity, cannot perform any legal transactions. Person not attaining the age of seven years shall be deemed as a person not understanding the nature of transactions.

...

Article 78

The judge is the guardian of persons having no guardians.

...

Article 236

1. Child care is the protection and raising of a child during a period when he/she is in need of a woman's protection and care.
2. Child care is the right of those who are entitled by this law.

Article 237

The mother shall have the priority right to the protection and care of the child during marriage and separation provided she should have qualifications required for child care.

...

Article 242

Where more than one person has the right to the care of the child, the court may select any of the two who is more in the interest of the child.

...

Article 249

The care period of a male child shall be ended when he attains the age of seven, and the care period of a female child shall be ended when she reaches the age of nine.

Article 250

The court can extend the fosterage period of the child described in article 249 of this law provided the extension period does not exceed two years.

Article 251

Where it is proved that the person taking care of the child is not in the interest of the child even though he may be the father of the child, the court can give the child to the care of the second person who is entitled to the care of the child.

...

Article 256

The father shall provide maintenance to the minor son until he acquires the power to work and to the minor daughter until she gets married.

Article 257

The father shall be bound to pay for the maintenance of his son who is attaining majority age but is poor and has not ability to work. He shall also provide for the maintenance of his daughter, who has attained the age of majority but is poor, until she gets married.

International Law

Convention on the Rights of Child[\[14\]](#)

Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Additional Resources and Links

International Development Law Organization, Laws of Afghanistan - www.idli.org/Afghanlaws

United Nations Integrated Regional Information Networks - www.irinnews.org

Afghanistan Online - www.afghan-web.com

Afghanistan Government Website - <http://www.afghangovernment.com/>

Afghanistan Independent Human Rights Commission (AIHRC) - <http://www.aihrc.org.af/>

AIHRC, Child Protection Unit - http://www.aihrc.org.af/chi_rig.htm

Endnotes

[1] This page is also available as a **Error! Hyperlink reference not valid.**, and **Error! Hyperlink reference not valid.**

[2] CONST. OF AFGHANISTAN, art. 7 available at http://www.afghan-web.com/politics/current_constitution.html and also [here](#), and also as [.pdf Document](#), and also as [Word Document](#).

[3] U.S. Dept. of State, Country Reports on Human Rights Practices: Afghanistan, Feb. 28, 2005, available at <http://www.state.gov/g/drl/rls/hrrpt/2004/41737.htm>, and also [here](#), and also as [.pdf Document](#), and also as [Word Document](#).

[4] For more information, see <http://www.law.umich.edu/library/refres/resguides/pdfs/afghanistan.pdf> and <http://www.foreignlawguide.com/ip/>

[5] Afghan Independent Human Rights Commission, Child Protection Unit, http://www.aihrc.org.af/chi_rig.htm.

[6] CONST. OF AFGHANISTAN, *supra* note 2, at art. 58.

[7] AFGHAN. CONST., art. 54, 58 available at <http://www.afghan-web.com/politics/currentconstitutiondaripashto.pdf> and also [here](#), and also as [.pdf Document](#), and also as [Word Document](#).

[8] We were unable to obtain a copy of the Civil Code in Pashto or Dari.

[9] G.A. Res. 44/125, U.N. GAOR, 44th Session, Supp. No. 49, U.N. Doc. A/44/736 (1989), available at http://www.unicef.org/magic/media/documents/CRC_dari_language.pdf and also as [.pdf Document](#).

[10] Other than the excerpt of the Convention on the Rights of the Child, the following passages are unofficial translations.

[11] CONST. OF AFGHANISTAN, *supra* note 2, at art. 54, 58

[12] The Commission was established according to the Decree of the Presidency of the Interim Administration of Afghanistan on the Establishment of an Afghan Independent Human Rights Commission.

[13] The Civil Code, *available at* http://www.idli.org/Afghanlaws/Laws%201921_todate.htm, *and also as* [.pdf Document](#).

[14] G.A. Res. 44/125, U.N. GAOR, 44th Session, Supp. No. 49, U.N. Doc. A/44/736 (1989), *available at* <http://www.ohchr.org/english/law/crc.htm>. Not clear what force in the law, if any, the CRC carries and in what order of authority.